No. 91-500

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

AMIDIO MATTEI, JOSEPH MATTEI, and DOMENIC J. MATTEI,

Petitioners,

vs.

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, as agent for PETER J. LIVOLSKI and ALBERT W. BETLER, Trustees *ad Litem*, LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA WELFARE AND PENSION FUNDS, THE CONSTRUCTION INDUSTRY ADVANCEMENT PROGRAM OF WESTERN PENNSYLVANIA, and LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA and its affiliated local unions,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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Question Presented

If a United States Circuit Court of Appeals finds that state law has been preempted by a specific act of Congress during the pendency of a State Court appeal of a judgment predicated upon that law which has been preempted, is the State Court divested of subject matter jurisdiction and any final judgment entered thereafter negated of all efficacy and subject to collateral attack at any time, including petition to strike proffered to challenge ancillary execution proceedings instituted by the judgment plaintiff?

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IN THE

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No. _____

AMIDIO MATTEI, JOSEPH MATTEI, and DOMENIC J. MATTEI,

Petitioners,

vs.

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, as agent for PETER J. LIVOLSKI and ALBERT W. BETLER, Trustees *ad Litem,* LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA WELFARE AND PENSION FUNDS, THE CONSTRUCTION INDUSTRY ADVANCEMENT PROGRAM OF WESTERN PENNSYLVANIA, and LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA and its affiliated local unions,

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Order of the Supreme Court of Pennsylvania entered August 8, 1991, at proceedings No. 159 W.D. Allocatur Docket 1991, is printed in the Appendix hereto, *infra*, page A1. The Opinion and Order of the Superior Court of Pennsylvania entered February 26, 1991, at proceedings No. 1840 Pittsburgh, 1989, is printed in the Appendix hereto, *infra*, pages A2-A7. The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania entered February 6, 1990 at proceedings GD84-3461, is printed in the Appendix hereto, *infra*, pages A8-A15. The Opinion of the Superior Court of Pennsylvania entered December 17, 1986 at proceedings 192 Pittsburgh 1986 is printed in the Appendix hereto, *infra*, pages A16-A27

The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania entered May 2, 1986 at proceedings GD84-3461, is printed in the Appendix hereto, *infra*, pages A28-A33.

Jurisdiction

The Judgment of the Supreme Court of Pennsylvania at proceedings No. 159 W.D. Allocatur Docket 1991 (Appendix, *infra*, page A1) was entered on August 8, 1991. Jurisdiction to the Supreme Court of the United States is invoked under 28 U.S.C. §1257(a).

Constitutions and Statutes Involved

This case involves the interpretation and the application of Article VI, Section 2 of the Constitution of the United States, which provides:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Further, this Court will be called upon to interpret the preemption provision of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1144(a)) and its application to state court proceedings brought under state laws which coincide with ERISA's purposes. The section reads as follows:

> "This Act shall supersede any and all state laws as they may now or hereafter relate to any employee benefit plan described in §1003(2) of this title and not exempt under §1003(b) of this title."

The state statutes that shall be interpreted by this Court are codified at 43 P.S. §2601.1, *et seq.* and known as the Pennsylvania Wage Payment Law are printed in their entirety in the Appendix hereto, *infra*, A39-A48.

Statement of the Case

On March 1, 1984, the instant case was commenced in the Common Pleas Court of Allegheny County, Pennsylvania. The suit was brought to collect unpaid pension and fringe benefits accruing between May 1, 1983 through November 15, 1983 under a collective bargaining agreement executed October 27, 1982 between the Laborers District Council of Western Pennsylvania and a corporation known as Mattei Brothers, Inc. The Respondents were the administrative body and individuals charged with monitoring and managing the plan. The Petitioners were the sole stockholders and officers of the corporation. They were named as party defendants in their representative capacity as employers pursuant to applicable provisions of the Pennsylvania Wage Payment and Collection Law (43 P.S. §260.2a and §260.9a), Appendix, *infra*, pages A39-A40 and A45-A46). The Petitioners filed timely Answer to the Complaint premising as their defense that they should not be regarded as statutory employers. That they were not responsible for (a) the Corporation's failure to transmit monthly contributions to the Respondents in that this failure arose from embezzlements by the Corporation's bookkeeper of sums exceeding $359,000.00 that seriously decapitalized the Corporation, causing it to fall in arrears with virtually all of its creditors; and (b) in the absence of a showing of scienter or other wrongdoing on their part, they should not be held personally accountable for the failure of the Corporation to transmit the sums due the Respondents under the collective bargaining agreement.

The original case proceeded to non-jury trial on October 16, 1985 and a verdict was entered in Respondents' favor in the amount of $44,241.65.

Petitioners filed timely Post-Trial Exceptions which were denied by Order of Court entered December 30, 1985. The Respondents, in turn, entered judgment on the verdict January 13, 1986. It was from this judgment that the Petitioners lodged their first appeal to the Superior Court of Pennsylvania.

On initial appeal to the Superior Court (192 Pittsburgh, 1986), the only issues submitted for resolution concerned the Petitioners' defense of exculpability in the absence of evidence of scienter or other wrongdoing and that they should not be regarded as statutory employers under the Pennsylvania Wage Payment and Collection Law. By Opinion and Order entered December 17, 1986 and reported at 359 Pa. Super. 399, 518 A2d 1296 (1986), commenting the case was one of first impression, the Superior Court found that the defenses proposed by the Petitioners were legally insufficient to defeat the action brought by the Respondents. The trial court's original judgment was affirmed and the record returned to the Prothonotary of Allegheny County, Pennsylvania.

Thereafter, nothing transpired further in these proceedings until September 21, 1989, when collection actions to enforce the judgment were undertaken by the filing of a praecipe for writ of execution. Real estate comprising of a tract of land with concrete warehouse and owned by the Petitioner, Amidio J. Mattei, was levied upon and scheduled for Sheriff's Sale to be conducted December 1, 1989. On November 22, 1989, the Petitioners caused to be presented to the Common Pleas Court of Allegheny County, Pennsylvania, a Petition For Rule To Show Cause Why Judgment Should Not Be Opened and/or Stricken as Being Void *Ab Initio*, Stay of Execution Proceedings and Release From Levy

(Appendix, *infra*, pages A34-A38). The Petition was premised on the fact the original judgment was void for want of subject matter jurisdiction in the first instance, unenforceable, and should be stricken as a matter of law, and the property should be released from levy.

The substance of the Petition was as follows:

(a) The State Court was without subject matter jurisdiction to entertain the proceedings in the first instance in that its jurisdiction was divested under federal principles of preemption and in contravention of the pronouncement of the United States Supreme Court as recited in *Metropolitan Life Insurance Co. v. Mass.*, 471 U. S. 724, 105 Sct. 2380, 85 L.Ed 2d 728 (1985), an opinion interpreting the preemption provisions of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1144(a)) (hereafter ERISA) and rendered prior to the entry of the initial judgment in these proceedings. Also recited as controlling was the Third Circuit Court of Appeals decision in *McMahon v. McDowell*, 794 F2d 100 (3rd Cir. 1986), which specifically held ERISA preempted all actions in state court under the Pennsylvania Wage Payment Law for enforcement of matters governed under ERISA (issued June 24, 1986 during Petitioners initial appeal to the Superior Court and before disposition of the case).

(b) The preemption argument not theretofore having been raised could be raised to attack the underlying judgment for want of subject matter jurisdiction at the first instance.

(c) That the judgment was entered in violation of an Act of congress and the Supremacy Clause of Article VI, Section 2 of the United States Constitution.

The Common Pleas Court, without taking further evidence, denied the Petition by Order entered November 28, 1989 (Appendix, *infra*, page A38). It was from this final Order the Petitioners lodged the instant, and now second, appeal to the Superior Court of Pennsylvania. Upon posting of adequate security on December 13, 1989, a supersedeas order was docketed. On February 6, 1990, the Opinion of the Lower Court was filed (Opinion: Appendix, *infra*, pages A8-A15). Oral argument was held October 16, 1990 and by Opinion and Order entered February 26, 1991 (without addresing in any part the application of the United States Supreme Court's holding of *Metropolitan Life* to the instant proceedings), the Order of the lower court was affirmed (Opinion: Appendix, *infra*, pages A2-A7). Petitioners thereafter lodged a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on March 27, 1991, raising the federal questions as more fully addressed herein. The Petition for Allowance of Appeal was denied by Order entered August 8, 1991 (Appendix, *infra*, A1). It is from this final Order of the Supreme Court of Pennsylvania the instant Petition for Certiorari is lodged.

Reasons for Granting Writ

The Pennsylvania Wage Payment and Collection Law (43 P.S. §2601.1 *et seq.*), hereafter referred to as WPCL, is legislation directed at providing remedies for the collection of monies due individuals and labor organizations arising out of employment. Amongst the Statute's definitional elements, the following language appears:

> " 'Fringe benefits or wage supplements.' Includes all monetary employer payments to provide benefits under any employee benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* . . . ."
>
> " 'Wages.' Includes all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation. The term 'wages' also included *fringe benefits or wage supplements* . . . ." (Emphasis added).
>
> [43 P.S. §260.2a (Appendix 1989)]

ERISA contains an explicit and broad preemption provision which, in pertinent part, provides the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in §1003(a) of this title and not exempt under §1103(b) of this title." [Underscoring added; 29 U.S.C. §1144(a)]. In interpreting this section of the Statute, this Court, first in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 1221, 103 S. Ct. 2890, 77 L.Ed. 2d 490 (1983) and subsequently in *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed 2d 728 (1985), explicitly held that:

> "the phrase 'relate to' [is] given its broad common-sense meaning, such that a state 'related [a] to' a benefit plan 'in the normal sense of the phrase, if it

> has a connection with or reference to such a plan' (*Shaw, supra*, 463 U.S. at 97, 103 S. Ct. at 2900). The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." (*Metropolitan Life, supra*, 471 U.S. at 834, 105 S. Ct. at 2389).

It is undisputable that the Respondents' action in the within case "related to" matters governed by ERISA. The action was to recover benefits due under the collective bargaining agreement for contributions unpaid to their benefits plan. Jurisdiction of the Common Pleas Court was invoked under the WPLC which, in pertinent part, incorporates the definitional elements of ERISA (43 P.S. §260.2a). Under *Shaw, supra*, and *Metropolitan Life, supra, the state law*, even though coinciding with the intents of ERISA, directly conflicted with its intents and purposes as being the "exclusive" law of the realm on the subject.

Shaw, supra, and *Metropolitan Life, supra*, were decided, the first, before institution of suit, the latter, before entry of judgment in the original proceedings. The judicial mandates pronounced by both were in effect before matters were concluded in the trial stage of the instant case. The Court below, in its Opinion in support of the Order to deny the Petition to Open and/or Strike (Appended hereto) circumvented this fact by falsely rationalizing, under the theory of prospective application of judicial decisions, that the WPCL was not preempted at the time the trial phase was concluded. In support of this rationale, it recited, as did the Petitioners, *McMahon v. McDowell*, 794 F.2d 100 (3rd Cir. 1986) which was entered after the Appellants' submission of their brief to the Superior Court of Pennsylvania in the first appeal.

McMahon, supra, overruled *Carpenters Health & Welfare Fund v. Ambrose*, 727 F.2d 279 (3rd Cir. 1983) which had originally found the enforcement provisions of the WPCL were not in conflict with ERISA. In overruling *Carpenters Health, supra*, the Third Circuit Court of Appeals was explicit in reciting its interpretation of this Court's decisions in *Shaw, supra*, and *Metropolitan Life* were dispositive of the issues of preemption. The lower Courts failed to see the proper application of prospectivity or retroactivity. If retroactive or prospective application were to be invoked, they ran not from the date the Third Circuit entered *McMahon, supra*, it ran from the date this Court entered *Shaw, supra*, and *Metropolitan Life, supra*. If the lower Courts were correct in holding the date *McMahon, supra*, was issued as the time retroactive or prospective applications are to be invoked, they failed to note the instant case was still pending in the judicial system, had not been finalized and was subject to being challenged for want of subject matter jurisdiction.

In *Kalb v. Feurstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L.Ed. 2d 270 (1939), Justice Hugo Black delivered the opinion for a unanimous court and stated that a judgment by a court of competent jurisdiction usually bears a presumption of regularity and is not normally subject to collateral attack, but actions undertaken upon a subject that is plenary to Congress and on a subject which the state court has been preempted of jurisdiction, the judgment obtained thereunder in the state is a nullity and vulnerable to collateral attack. Although *Kalb* addressed matters deriving from Congress' plenary powers over bankruptcy, the analogy holds true in the instant case. ERISA was enacted under the Interstate Commerce Clause which is plenary to Congress like bankruptcy. In exercising this power, Congress, under

ERISA, enacted a broad preemption provision denying the states from exercising any authorities relating to benefit plans governed by ERISA. Although a state judgment is presumptively correct, it is subject to collateral attack if acquired in violation of the preempting statute. As in *Kalb, supra*, the issue of subject matter jurisdiction was not theretofore addressed in the original proceedings, and being a matter not waived, may be raised as was done herein.

The instant Petition for Writ of Certiorari should be granted for the following reasons:

a) The lower courts have decided a question of substance not heretofore addressed by this Court (Case of first impression).

b) The decisions of the lower and intermediate Appellate Courts are not in accord with the holding of the Supreme Court of the United States as announced in *Kalb, supra.*

c) Is *Kalb, supra*, still reliable and viable precedence and applicable to situations as herein presented?

d) The issues raised in these proceedings address matters of serious judicial concerns appertaining to the finality of judgments and the interrelationships of state and federal court jurisdiction under the preemption doctrine; the legal ramification caused to a state court judgment when a federal court decision divests the state court of jurisdiction before the finality of the proceedings in the state court system; should a state court apply the law as pronounced by the United States Supreme Court or may it await until the Circuit Court of Appeals for its jurisdiction addresses the issue and, if so, what is the effect upon pending state court proceedings; and when may lack of subject matter jurisdiction be raised [timeliness].

For the reasons recited above, this Honorable Court should grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

Order of the Supreme Court of Pennsylvania Entered August 8, 1991 Denying Petition for Allowance of Appeal

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CHARLES W. JOHNS, ESQUIRE
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

August 12, 1991

P. Andrew Diamond, Esquire
1040 Fifth Avenue
Pittsburgh, PA 15219

In Re: *Laborers Combined Funds of Western Pa., etc., et al. v. Amidio Mattei, et al.*
No. 159 W.D. Allocatur Docket 1991

Dear Mr. Diamond:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"Petition Denied
Per Curiam
8/8/91"

Very truly yours,

IRMA T. GARDNER
DEPUTY PROTHONOTARY

ITG:cs
cc: Gary P. Hunt, Esquire
Richard B. Tucker, III, Esquire
Hon. Eugene B. Strassburger, III, A.J.

Opinion and Order of the Superior Court of Pennsylvania Entered February 26, 1991

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1840 Pittsburgh, 1989

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, as agent for PETER J. LIVOLSI; and ALBERT W. BETLER, Trustees ad litem, LABORERS DISTRICT COUNSEL OF WESTERN PENNSYLVANIA WELFARE AND PENSION FUNDS, THE CONSTRUCTION INDUSTRY ADVANCEMENT PROGRAM OF WESTERN PENNSYLVANIA FUND, and the LABORERS DISTRICT COUNSEL OF WESTERN PENNSYLVANIA and its affiliated local unions,

vs.

AMIDIO MATTEI, JOSEPH MATTEI and DOMENIC J. MATTEI,

APPEAL OF: AMIDIO J. MATTEI and DOMENIC J. MATTEI.

Appeal from Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. G.D. 84-3461.

BEFORE: ROWLEY, WIEAND and HUDOCK, JJ.

OPINION BY WIEAND, J.: FILED: FEBRUARY 26, 1991

As a result of a non-jury trial held in October, 1985, Laborers Combined Funds of Western Pennsylvania, trustees of a health, welfare and pension fund for construction laborers (the Fund), recovered a judgment against Amidio Mattei and Domenic J. Mattei, officers and directors of Mattei Brothers, Inc., for failing to make contributions to the Fund in the amount of $44,241.65. The judgment was affirmed by the Superior Court in December, 1986. See: *Laborers Combined Funds of Western Pennsylvania v. Mattei*, 359 Pa.Super. 399, 518 A.2d 1296 (1986). In September, 1989, the trustees issued execution on the judgment. Thereafter, the Matteis filed a petition to open or strike the judgment. The trial court dismissed the petition, and the Matteis appealed.

The basis for the petition to strike the judgment was appellants' contention that the provisions of the Wage Payment and Collection Law, 43 Pa.C.S. §2601 et seq. which imposed personal liability upon officers and directors for contribution, had been preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq. Such preemption had been found in 1986 by the Third Circuit in *McMahon v. McDowell*, 794 F.2d 100 (3rd Cir. 1986), *cert. denied*, 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1986). The preemption issue, however, had not been asserted as a defense in the prior action and was not preserved for review on appeal. Indeed, the Third Circuit had previously held that there had been no preemption. See: *Carpenter's Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983). The issue before this Court, therefore, is to determine whether *McMahon v. McDowell, supra*, is to be applied retroactively to vitiate the judgment previously entered and now being enforced by appellees.

Counsel have not called to our attention and our own research has failed to disclose any decision dealing with the retroactivity of *McMahon v. McDowell, supra.* However, there are decisions in other preemption cases which have refused to apply preemption holdings retroactively to cases adjudicated finally in state courts. These decisions have been carefully reviewed and analyzed in the opinion of the learned trial judge; and, therefore, we quote from his opinion as follows:

"In [*McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)], the Supreme Court held that California's community property law permitting the distribution upon divorce of military pensions was preempted by federal military pay provisions. Following this decision, numerous attempts were made to overturn property distribution decisions rendered pre-*McCarty*, on the basis that the courts rendering those decisions had lacked subject matter jurisdiction over the military pension. The courts *uniformly* rejected such challenges, holding that *McCarty* should not be applied retroactively so as to overturn settled judgments. (footnote omitted).

"Probably the leading case involving the non-retroactivity of *McCarty* was *Sheldon v. Sheldon*, 124 Cal. App.3d 371, 177 Cal. Rptr. 380 (1981), *appeal dismissed for want of a substantial federal question*, 464 U.S. 941[, 102 S.Ct. 2002, 72 L.Ed.2d 462] (1982). In *White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984), the Court held that the Supreme Court's dismissal for want of a substantial federal question was a decision on the merits of the issues presented in the statement of jurisdiction. One of the questions presented in *Sheldon* was:

> Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack

of subject matter jurisdiction where such judgments entered after Congress had preempted area of law?

"Other cases holding *McCarty* non-retroactive include *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir.), *cert. denied*[,] 464 U.S. 933[, 104 S.Ct. 337, 78 L.Ed.2d 306] (1983); *Erspan v. Badgett*, 659 F.2d 26 (5th Cir. 1981); *Segrest v. Segrest*, 649 S.W.2d 610 (Tex.), *cert. denied*[,] 464 U.S. 894, 104 S.Ct. 242[, 78 L.Ed.2d 232] (1983); *Camp v. Camp*, 142 Cal. App.3d 217, 191 Cal. Rptr. 45 (1983); *F[e]llers, v. F[e]llers*, 125 Cal. App.3d 254, 178 Cal. Rptr. 35 (1981); *Marriage of Vinson*, 57 Or. App. 355, 644 P.2d 635 (1982); *Rodrigues v. Rodrigues*, 133 Ariz. 88, 649 P.2d 291 (1982); *Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982); and *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982).

"Most of the cases analyzed the retroactivity issue in terms of the criteria laid down by the Supreme Court in numerous cases including *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50, 102 S.Ct. 2858[, 73 L.Ed.2d 598] (1982). The Court there discussed a tripartite standard for determining whether a judicial decision should be accorded retroactive effect:

> 1) Was it clearly foreshadowed, or did it overrule precedent?
>
> 2) Would retroactive application further or retard the effect of the decision?
>
> 3) Would retroactivity bring about substantial inequitable results, including harm to the judicial system?

"The cases refusing to apply *McCarty* retroactively found that it had not been foreshadowed, despite the fact that in *Hisquierdo v. Hisquierdo*, 439 U.S. 572[, 99 S.Ct. 802, 59 L.Ed.2d 1] (1979), the Court had previously held that railroad retirement pensions were preempted from

state court consideration. The instant case is even a much stronger case against retroactivity, for only three years prior to *McMahon*, the Third Circuit had specifically held that ERISA did not preempt the [Wage Payment and Collection Law]. *Carpenter's Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, [*supra*].

"The second factor of *Northern Pipeline* also points toward non-retroactivity of *McMahon*. As set forth in *McMahon*, the purpose of this preemption provision in ERISA is to provide a uniform procedure for assuring the funding of employee benefits plans. While the instant type of suit could conceivably frustrate that procedure in the future, the overturning of judgments years later when no other procedure could then be followed not only would not further the plan of ERISA, but would hinder it further.

"Finally, many of the above-cited cases point to the third factor of *Northern Pipeline*: 'Would retroactivity bring about inequitable results?' In *Sheldon v. Sheldon*, *supra*, after noting the emotional and financial turmoil caused by a divorce proceeding, the Court stated:

> 'To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones.' 177 Cal. Rptr. at 384, 124 Cal.App.3d at 380.

Certainly a similar situation exists in the labor arena. Where an often fragile peace exists between labor and management, it would be foolhardy to vacate judgments long thought inviolate and thus risk strife where calm previously existed. Particularly is this so where Plaintiffs and others similarly situated relied upon the statutory scheme outlined in the [Wage Payment and Collection Law] in efforts to collect the fringe benefit contributions

then due. At this late date, statutes of limitation or other procedural bars such as intervening bankruptcies or dissolutions could impair workers' ability to collect sums rightfully due them.

"Moreover, according retroactive effect to *McMahon* could also cause an 'immense burden on the administration of justice in our civil courts were such relitigation permitted'. *Sheldon, ibid.* Not only would each judgment debtor seek to reopen the judgment, but executions upon such judgments would be in jeopardy as well. And the employee creditors would of course be bringing other actions to try to enforce their rights through different remedies to replace the remedy newly abrogated."

The issue of preemption was not raised in defense of appellees' substantive claim. *McMahon* was decided by the Third Circuit between the time of trial and argument of the appeal before the Superior Court. The issue of preemption was not argued on appeal, and the judgment entered in the trial court was thereafter affirmed. Appellants did nothing more for almost three years and were nudged into action only when appellees executed upon their judgment. Under these circumstances, appellants' rights to assert a preemption defense must be deemed to have been lost by their own inaction and the passage of time. The trial court properly refused to strike the judgment.

Order affirmed.

Opinion of the Court of Common Pleas
of Allegheny County, Pennsylvania
Entered February 6, 1990

No. GD84-3461

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, et al.,

Plaintiffs,

v.

DOMENIC J. MATTEI and AMIDIO MATTEI,

Defendants,

and

MARY LOUISE MATTEI,

Terre Tenant.

OPINION

STRASSBURGER, J.

Plaintiffs are the trustees [Trustees] of a health, welfare and pension fund [Fund] established for the benefit of construction laborers. The Defendants are officers and directors of Mattei Brothers, Inc., a corporation which was contractually obligated to make contributions to the Fund on behalf of its employees.

On March 1, 1984, the Trustees commenced an action against the Defendants, claiming that Mattei Brothers, Inc. had failed to make the required contributions to the Fund for the period of May 1, 1983 through November

15, 1983. The Trustee's claim against the Defendants was based upon the Pennsylvania Wage Payment and Collection Law [WPCL], 43 Pa. C.S.A. §260.1 *et seq.* Under the WPCL, the officers and directors of a corporation are personally liable for the failure of the corporation to pay wages to its employees. The WPCL has defined "wages" to include fringe benefit contributions which are required to be made by the corporation.

In October, 1985, a non-jury trial was held before Judge Bernard J. McGowan. On October 16, 1985, Judge McGowan entered a non-jury verdict in favor of the Trustees and against the Defendants in the amount of $44,241.65.

Defendants filed exceptions to the non-jury verdict which were dismissed after argument. On January 13, 1986 judgment was entered on the non-jury verdict.

Defendants filed an appeal to the Superior Court. While this appeal was pending, the U. S. Court of Appeals for the Third Circuit handed down the decision of *McMahon v. McDowell*, 794 F.2d 100 (3rd Cir. 1986), *cert. denied*, 479 U.S. 971 (1986). In that decision the Third Circuit held that the WPCL was preempted by the Employee Retirement Income Security Act [ERISA] (Pub. L. 93-406, 88 Stat. 832, codified as amended in scattered sections of 26 and 29 U.S.C.), to the extent the WPCL dealt with the same matters as ERISA.

This issue had not been raised or argued by the Defendants during the trial court proceedings, nor had it been raised by way of the post-trial exceptions or in the Defendants' brief to the Superior Court. However, in the Trustees' Superior Court brief, which was filed on July 16, 1986, counsel for Trustees directed the Court's attention to the *McMahon* decision in a footnote, stating:

> "The Matteis did not raise below, and have not raised on this appeal, the issue of whether the WPCL has been preempted by the Employment Retirement Income Security Act ... ("ERISA"). Since they failed to raise this issue in the lower court, it cannot be considered for the first time on appeal. *Amalgamated Cotton Garment and Allied Industries Fund v. Dion*, 341 Pa. Super. 12, 491 A.2d 123 (1984) (appellant attempted to raise the issue of the WPCL's preemption of ERISA for the first time on appeal). Thus, the Third Circuit's recent decision in *McMahon v. McDowell* ... is irrelevant to this Court's consideration of the pending appeal."

The Superior Court affirmed the judgment in December, 1986.

In September, 1989, the Trustees issued execution on the judgment, and a Sheriff's sale of a commercial piece of property was scheduled. A few days before the date of the Sheriff's sale, the Defendants filed a Petition to Open/Strike the judgment. By order dated November 28, 1989, this court denied the requested relief. This appeal followed.

Defendants contend that as a result of the *McMahon* case, Plaintiffs' judgment is void and thus unenforceable. This court disagrees.

Essentially, what Defendants seek is a retroactive application of *McMahon*.[1] Although research has disclosed no case dealing specifically with the retroactivity of *McMahon*, in an analogous preemption situation, the courts of the United States, including the

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[1] The case is not similar to *Kalb v. Feuerstein*, 308 U.S. 433 (1940), relied upon by Defendants. That case held that the automatic stay provision of the Bankruptcy Act was self-executing, and thus state court judgments entered in violation thereof were a nullity.

United States Supreme Court, have uniformly held that *McCarty v. McCarty*, 453 U.S. 210 (1981) is not to be applied retroactively.

In *McCarty*, the Supreme Court held that California's community property law permitting the distribution upon divorce of military pensions was preempted by federal military pay provisions. Following this decision, numerous attempts were made to overturn property distribution decisions rendered pre-*McCarty*, on the basis that the courts rendering those decisions had lacked subject matter jurisdiction over the military pension. The courts *uniformly* rejected such challenges, holding that *McCarty* should not be applied retroactively so as to overturn settled judgments.[2]

Probably the leading case involving the non-retroactivity of *McCarty* was *Sheldon v. Sheldon*, 124 Cal. App.3d 371, 177 Cal. Rptr. 380 (1981), *appeal dismissed for want of a substantial federal question*, 464 U.S. 941 (1982). In *White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984), the Court held that the Supreme Court's dismissal for want of a substantial federal question was a decision on the merits of the issues presented in the statement of jurisdiction. One of the questions presented in *Sheldon* was:

> Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law?

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[2] One case, *Ex Parte Buckhanan*, 626 S.W.2d 65 (Tex. App. 1981) had held that *McCarty* was to be applied retroactively. However, it was specifically disapproved by the court en banc in *Ex Parte Hovermale*, 636 S.W.2d 828 (Tex. App. 1982).

Other cases holding *McCarty* non-retroactive include *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir.), *cert. denied* 464 U.S. 933 (1983); *Erspan v. Badgett*, 659 F.2d 26 (5th Cir. 1981); *Segrest v. Segrest*, 649 S.W.2d 610 (Tex.), *cert. denied* 464 U.S. 894, 104 S.Ct. 242 (1983); *Camp v. Camp*, 142 Cal. App.3d 217, 191 Cal. Rptr. 45 (1983); *Fallers v. Fallers*, 125 Cal. App.3d 254, 178 Cal. Rptr. 35 (1981); *Marriage of Vinson*, 57 Or. App. 355, 644 P.2d 635 (1982); *Rodrigues v. Rodrigues*, 133 Ariz. 88, 649 P.2d 291 (1982); *Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982); and *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982).

Most of the cases analyzed the retroactivity issue in terms of the criteria laid down by the Supreme Court in numerous cases including *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50, 102 S.Ct. 2858 (1982). The Court there discussed a tripartite standard for determining whether a judicial decision should be accorded retroactive effect:

> 1) Was it clearly foreshadowed, or did it overrule precedent?
>
> 2) Would retroactive application further or retard the effect of the decision?
>
> 3) Would retroactivity bring about substantial inequitable results, including harm to the judicial system?

The cases refusing to apply *McCarty* retroactively found that it had not been foreshadowed, despite the fact that in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court had previously held that railroad retirement pensions were preempted from state court consideration. The instant case is even a much stronger case against retroactivity, for only three years prior to *McMahon*, the Third Circuit had specifically held that ERISA did not

preempt the WPCL. *Carpenter's Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983).

The second factor of *Northern Pipeline* also points toward non-retroactivity of *McMahon*. As set forth in *McMahon*, the purpose of this preemption provision in ERISA is to provide a uniform procedure for assuring the funding of employee benefit plans. While the instant type of suit could conceivably frustrate that procedure in the future, the overturning of judgments years later when no other procedure could then be followed not only would not further the plan of ERISA, but would hinder it further.

Finally, many of the above-cited cases point to the third factor of *Northern Pipeline:* "Would retroactivity bring about inequitable results?" In *Sheldon v. Sheldon*, *supra*, after noting the emotional and financial turmoil caused by a divorce proceeding, the Court stated:

> "To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones." 177 Cal. Rptr. at 384, 124 Cal. App.3d at 380.

Certainly a similar situation exists in the labor arena. Where an often fragile peace exists between labor and management, it would be foolhardy to vacate judgments long thought inviolate and thus risk strife where calm previously existed. Particularly is this so where Plaintiffs and others similarly situated relied upon the statutory scheme outlined in the WPCL in efforts to collect the fringe benefit contributions then due. At this late date, statutes of limitation or other procedural bars such as intervening bankruptcies or dissolutions could impair workers' ability to collect sums rightfully due them.

Moreover, according retroactive effect to *McMahon* could also cause an "immense burden on the administration of justice in our civil courts were such relitigation permitted". *Sheldon, ibid.* Not only would each judgment debtor seek to reopen the judgment, but executions upon such judgments would be in jeopardy as well. And the employee creditors would of course be bringing other actions to try to enforce their rights through different remedies to replace the remedy newly abrogated.

For the above reasons, it would be improper to apply *McMahon* retroactively in *any* case. The particular facts of the instant case make it even more inappropriate to grant the relief requested by Defendants. *McMahon* was decided by the Third Circuit between the time of trial and the argument on appeal in the Superior Court. Thus Defendants could have cited *McMahon* and argued for a limited retroactivity, applying it to cases then on appeal. *Compare Sheldon v. Sheldon, supra*, where the Court in rejecting full retroactivity for *McCarty*, did allow limited retroactivity so as to apply it to a case not yet final on appeal where the issue was preserved in the trial court. Yet the instant Defendants did not so argue in 1986, although in light of Plaintiff's citation to *McMahon* in their brief, Defendants had to be aware of the case. Defendants waited three years, until November 30, 1989, to file their petition to open or strike the judgment.

In *Myers v. Mooney Aircraft, Inc.*, 429 Pa. 177, 240 A.2d 505 (1967), the plaintiff Wilhere purported to serve defendant Mooney Aircraft, Inc. [Mooney] in compliance with Pa. R.C.P. 2180(a)(2). Mooney filed neither an appearance nor an answer and after a default judgment was taken over one and one-half years after the complaint was filed, Mooney wanted an additional

sixteen months to file a petition to strike (treated by the Court as a petition to open) the judgment. The Court held that "whatever rights Mooney might have had to attack this judgment have been lost by its own carelessness and the passage of time". 429 Pa. at 191. Similarly, the instant Defendants by their deliberate bypass of the Superior Court in 1986, and inordinate delay of three years thereafter, waived any right they may have had to vacate the judgment.

It would thus have been particularly inappropriate to apply *McMahon* to *this* case, where Defendants did not avail themselves of the opportunity they could have had in 1986, and then waited until 1989 to pursue relief.

In sum, Defendants' case was finally decided in 1986. There is no basis for applying a change in the law of this nature to this case, especially at such a late date.

STRASSBURGER, J.

February 6, 1990

Opinion and Order of the Superior Court of Pennsylvania Entered December 17, 1986

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 00192 Pittsburgh 1986

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, AS AGENT FOR PETER J. LIVOLSI, AND ALBERT W. BETLER, TRUSTEES AD LITEM, LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA WELFARE AND PENSION FUNDS, THE CONSTRUCTION INDUSTRY ADVANCEMENT PROGRAM OF WESTERN PENNSYLVANIA FUND, AND THE LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA AND ITS AFFILIATED LOCAL UNIONS

v.

AMIDIO MATTEI, JOSEPH MATTEI AND DOMENIC J. MATTEI

APPEAL OF: AMIDIO J. MATTEI AND DOMENIC J. MATTEI

Appeal from the Judgment entered in the Court of Common Pleas of Allegheny County, Civil at No. GD 84-3461.

BEFORE: DEL SOLE, KELLY and POPOVICH, JJ.

OPINION BY POPOVICH, J.: FILED: DECEMBER 17, 1986

This is an appeal from the judgment of the Court of Common Pleas of Allegheny County entered against the appellants (Amidio and Domenic J. Mattei[1]) in the amount of $44,247.65. We affirm in a case of first impression.

The undisputed facts reveal that the appellants are corporate officers of Mattei Bros., Inc., i.e., Domenic is secretary/treasurer with 49% of the stock and Amidio is president with 50% of the stock.

On October 27, 1982, Domenic, in his capacity as secretary/treasurer of the Corporation, entered into a collective bargaining agreement with the plaintiff/Laborers' District Council of Western Pennsylvania, an AFL-CIO affiliate representing eight (8) local unions. Pursuant to the agreement, the Corporation obligated itself to deduct a fixed percentage of monies from the employees' gross wages (for a Health and Welfare Fund, Pension Fund, Hourly Dues Deduction and Industry Advancement Funds) and remit the amount to a designated bank.

The plaintiff alleged in its complaint that the appellants failed to make the required payments from May through November of 1983. This failure to act, contended the plaintiff, constituted a violation of the collective bargaining agreement and entitled it to interest on the outstanding amount as a result thereof. Further, the plaintiff asserted that the appellants, as "officers and/or agents" of the Corporation, were considered an "employer" under the Pennsylvania Wage Payment and Collection Law (43 P.S. §260.1 et seq.). Under this designation, urged the plaintiff, the

[1] Joseph Mattei, listed as a party-defendant, was held not to be liable by the trial court.

appellants were automatically liable to pay liquidated damages for their default in the amount of 25% of the total remittance due.

The appellants' response was that their bookkeeper embezzled the Corporation's money, in the amount of $374,000, and, thus, the Corporation's ability to meet its obligations under the contract with the plaintiff was severely hampered. In fact, the Corporation's efforts to satisfy the arrearages due the various funds, with money generated from accounts receivable (estimated at $25,000), proved to be no solution since the current amounts due these same funds, in turn, became delinquent and brought the Internal Revenue Service into the picture. The end result was the Corporation's filing chapter XI bankruptcy in the Western District of Pennsylvania in an attempt to reorganize and salvage what it would of the business.[2]

Following argument on the case, and the denial of post-trial exceptions, the court entered its order in favor of the plaintiff. The order was reduced to judgment and is questioned on appeal.

The sole issue raised by the appellants at page iv of their brief is, in essence, one of whether, absent any evidence of culpability, the mere retention of a corporate office at the time that wage and pension benefits fall delinquent because of embezzlement activities of a

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[2] As an aside, we note that recoupment (in the form of restitution--$75,000) was secured on behalf of the Corporation following the bookkeeper's conviction of embezzlement in February of 1985 in the Court of Common Pleas of Allegheny County.

Also, although the question of what effect the Corporation's filing of a voluntary petition in bankruptcy might have on its contract is not before us, we observe that the matter is thoroughly covered at 18 Williston on Contracts §1930 et seq. (1978).

corporate employee sufficient basis alone to impose personal liability upon any corporate officer under 43 P.S. §§260.9a, 260.10.

We begin by observing that Pennsylvania's Wage Payment and Collection Law was promulgated to afford additional means to "an employee, labor organization, or party to whom any type of wages is payable to recover unpaid wages and liquidated damages". See 43 P.S. §260.9(a); *Haft v. U.S. Steel Corp.*, 305 Pa.Super. 109, 451 A.2d 445 (1982); *Todora v. Jones & Laughlin Steel Corp.*, 304 Pa.Super. 213, 450 A.2d 647 (1982). Further, as is relevant herein, the Act defines "wages" to include fringe benefits payable from amounts withheld from the employees' pay by an employer, which itself is defined to encompass a corporation or any agent or officer of a corporation employing any person in this Commonwealth. 43 P.S. §260.2a. Thus, there can be no dispute that Domenic and Amidio, as secretary/treasurer and president, respectively, of Mattei, Bros., Inc., would be considered an "employer" under the language of the Act.

As for an employer who obligates himself by agreement, as was the case here, to deduct monies from employes' pay for fringe benefit purposes, the Act requires that the employer *must* remit the deductions within a prescribed period. 43 P.S. §260.3(b). Failure to do so, as recited earlier, entitled the employee(s) or the(ir) representative to activate the remedial measures provided for under the Act, i.e., the filing of suit in any court of competent jurisdiction or, in the alternative, have the Secretary of Labor and Industry proceed in his stead. 43 P.S. §260.9a.

The question of liability under the Act is to be gleaned from a persual of the Act as a whole, and, in this effort, we seek to effectuate the intention and purpose of the Legislature by its passage (1 Pa.C.S. §1921), e.g., to provide an employee with a statutory remedy for an employer's *breach of its contractual obligation* to remit wages. See *Sendi v. NCR Comten. Inc.*, 619 F.Supp. 1577, 1579 (E.D. Pa. 1985).

The appellants would have us embrace the argument that the bookkeeper's embezzlement of the Corporation's monies is the equivalent of a "good faith dispute", provided for under the Act, exonerating them from any liability for payment. It is true that in subsection (c) of Section 260.9a and Section 260.10, both provisions allow as a defense to the claim by an aggrieved party for wages the "good faith contest or dispute of any wage claim . . . accounting for such nonpayment".[3]

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[3] The respective sections read as follows:

§260.9a. Civil Remedies and Penalties

* * * *

(c) The employe or group of employes, labor organization or party to whom any type of wages is payable may, in the alternative, inform the secretary of the wage claim against an employer or former employer, and the secretary shall, unless the claim appears to be frivolous, immediately notify the employer or former employer of such claim by certified mail. If the employer or former employer fails to pay the claim or make satisfactory explanation to the secretary of his failure to do so within ten days after receipt of such certified notification, thereafter, the employer or former employer shall be liable for a penalty of ten percent (10%) of that portion of the claim found to be justly due. A good faith dispute or contest as to the amount of wages due or the good faith assertion of a right of set-off or counter-claim shall be deemed a satisfactory explanation for nonpayment of such amount in dispute or claimed as a set-off or counterclaim. The secretary shall have a

(Footnote continued on following page.)

Nowhere in the Act is the aforementioned verbiage defined. However, since the Act is a supplementation to and not a substitute for one's common law cause of action for breach of contract (see *Sendi*, supra), we see no reason why the defenses acknowledged in the law for similar contract claims should not guide us in determining the viability of the appellants' contention to discharge their contractual obligation, the impairment of which was *caused* by the criminal acts of another.

Generally, to constitute a good defense to an action based on contract, the matters relied upon must be germane to the cause of action pleaded and must present a legal reason why the plaintiff should not recover. 8 P.L.E. Contracts §382. A primary example of the sexus necessary between the underlying basis for a suit that is filed and the legal justification in defense of the claim asserted is *G.A.C. Credit Corp. v. Acme Accordian Studios, Inc.*, 220 Pa.Super. 148, 286 A.2d 678 (1971).

(Footnote continued from preceding page.)

> cause of action against the employer or former employer for recovery of such penalty and the same may be included in any subsequent action by the secretary on said wage claim or may be exercised separately after adjustment of such wage claim without court action.
>
> §260.10 Liquidated damages
>
> Where wages remain unpaid for thirty days beyond the regularly scheduled payday, or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employe of a proper claim or for sixty days beyond the date of the agreement, award or other act making wages payable, or where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employe shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater.

43 P.S. §§260.9a(c), 260.10 (Supp. 1986).

In *Acme*, the creditor/appellant financed the debtor/appellee's purchase of various goods from a third party/franchisor. The third party arranged for the financing to help the appellee operate one of its franchises. After some time, the appellee and the third party terminated their relation, at which time a balance was still due the appellant for merchandise sold by the appellee but never repaid to the appellant. Pursuant to the appropriate documents, the appellant confessed judgment for the unpaid balance. It was opened thereafter on petition of the appellee, which culminated in an appeal to this Court.

The appellee, in its petition to open, admitted the indebtedness and that there was no legal relationship between the third party/franchisor and the appellant. The appellee maintained that all of its financing arrangements with the appellant were made through the third party, and that, therefore, it should be allowed to assert as defenses unliquidated claims which it allegedly had against the third party for credits and breach of contract. This Court refused to adopt the appellee's arguments and reversed the lower court's opening of the judgment. In the course thereof, we stated, as is relevant herein, that:

> The appellee . . . claims damages against [the third party] arising out of the latter's breach of their franchise agreement. However, even if appellee has a cause of action for breach of contract against [the third party], this is not a defense on the merits against appellant.[4]

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[4] . . . Here, the appellant's cause of action is based solely on the financing agreement while the alleged breach of contract stems from the franchise agreement between appellee and [the third party] . . . the transactions are clearly separate.

220 Pa.Super. at 151-52 n. 4, 286 A.2d at 680 n. 4.

Instantly, as in *Acme*, the conduct of a third party will not be permitted to affect the appellants' contractual obligations. Therefore, any impossibility of performance is, we believe, the result of conduct emanating from within the corporate structure, and, as a result, reverts back, as far as accountability goes, to those best equipped to monitor its inner workings, i.e., the officers. *A fortiori*, a breach of contract, not an excuse for failure to perform, is the correct appellation. See generally *Commonwealth ex rel. v. United States Fidelity & Guaranty Co.*, 314 Pa. 140, 146, 170 A. 686 (1934).

Further, as made mention of in the Restatement (Second) of the Law of Contracts §261, Comment *e*, "[e]ven if a party contracts to render a performance that depends on some act by a third party, he is not ordinarily discharged because of a failure by that party because this is a . . . risk that is commonly understood to be on the obligor." Nor has the law permitted an obligor to skirt liability under its contract because of its financial condition (see *Robert H. Fox Co. v. Keystone Driller Co.*, 232 F.2d 831, 836 (3rd Cir. 1956)), or the negligence of a third party hired by the obligor. *McLouth Steel Corp. v. Mesta Machine Co.*, 116 F.Supp. 689, 692 (E.D. Pa. 1953), aff'd 214 F.2d 608, cert. denied, *Hartford Acc. & Indem. Co. v. Foster*, 348 U.S. 873 (1954).

Thus, we see no logic in imposing the brunt of this financial fiasco on those so attenuated from the core of the fault as to be absolved from any wrongdoing, i.e., the union members, and place the obligation on the shoulders of those who make the decisions as to the manner in which the Corporation is managed. The Legislature, in its enactment of the Wage Payment and Collection Law,

has not indicated otherwise.[4] See *Ward v. Whalen*, 18 Pa. D. & C.3d 710, 712 (C.P. Allegheny County 1981), wherein it was written, with regard to personal liability of corporate officers for default under the Act,

> The Legislature had some purpose for including an agent or officer of a corporation employing persons in the Commonwealth within the definition of employer, and the only apparent purpose was to subject these persons to liability in the event that a corporation or similar entity failed to make wage payments. Its reason for doing so is obvious. Decisions dealing with personnel matters and the expenditure of corporate funds are made by corporate officers and it is far more likely that the limited funds of an insolvent corporation will be used to pay wages and that a work force will be reduced while the corporation is still capable of meeting its obligations to its employes if personal liability is imposed on the persons who make these decisions.

Accord *Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Ambrose, Inc.*, 727 F.2d 279, 282-83 (3rd Cir. 1983); *Amalgamated Cotton Garment v.*

[4] Parenthetically, we observe that the appellants' recourse is to seek recoupment from the former corporate employee/bookkeeper. If the appellants pay and, in the future, the errant bookkeeper makes good on her promise to repay the monies taken (see note 2, supra), the appellants' right to repayment will furnish reimbursement. See generally *Commonwealth ex rel. v. United States Fidelity & Guaranty Co.*, 314 Pa. 140, 147, 170 A. 686 (1934). In any event, as has been stated in Volume 2 of the Restatement (Second) of the Law of Contracts in the Introductory Note at page 309, contract liability is strict liability. It is an accepted maxim that *pacta sunt servanta*, contracts are to be kept. In other words, the obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated. *Id.* Accord *Monaca Borough v. Monaca Street Railway Co.*, 247 Pa. 242, 93 A. 344 (1915). For the espousal of a view reflective of some acknowledged defenses to a breach of contract, i.e., impossibility, see 6 Corbin on Contracts §1320 et seq. (1962).

J.B.C. Co. of Media, 608 F.Supp. 158, 168 (W.D. Pa. 1984); *In re Johnston*, 24 B.R. 685, 687 (1982).

We wish to make one last point. Of those courts which have had occasion to rule on the personal liability of corporate officers in the face of a corporation's failure to make its required contributions to various union funds, as provided for in their collective bargaining agreement, all have, without exception, held the officer(s) of the corporation personally liable, *and they did so without reference to any proof of culpability or scienter as a sine qua non to establishing a contravention of the Act in a civil suit.* See *Ambrose* supra; *Amalgamated Cotton Garment*, supra; *In re Johnston*, supra; *Amalgamated Cotton Garment and Allied Industries Fund v. Dion*, _____ Pa.Super. _____, 491 A.2d 123 (1985).

Therefore, having been presented with no reasons for meriting a reading of the element of "scienter" into the quantum of proof necessary to warrant a civil[5] redress of

[5] On this basis, i.e., the civil action brought by the appellee, we find the quantum of proof necessary to establish a criminal violation of the Act (43 P.S. §260.11a) is not so easily transposed to a civil suit for damages for breach of contract.

For instance, when dealing with those to be held criminally liable under the Act, subsection (c) of Section 260.11a speaks in terms of an "employer" encompassing "a corporation, the president, secretary, treasurer *or officers exercising corresponding functions*". The italicized portion has been interpreted in *Commonwealth v. Guigliano*, _____ Pa.Super. _____, 505 A.2d 317 (1986) to require that corporate officers must "exercise at least some functions of their offices" to be held criminally responsible.

However, it will be noted that the civil liability section of the Act (43 P.S. §260.9a) talks only in terms of the responsibility of the "employer", which does not include the additional element of those who *function* as corporate officers but lack the title customarily associated with the task being performed. Accordingly, we read the language in the two sections (civil vis-a-vis criminal) to denote an

(Footnote continued on following page.)

an aggrieved party's rights under the Act, we find that the appellants' corporate positions exposed them to liability for the corporation's breach of contract with the appellee. We, likewise, refuse to embrace the appellants' contention that the embezzlement of funds should be equated to a "good faith contest" of the "wages" claimed so as to exonerate them from responsibility under Sections 260.9a and 260.10. The reason is evident from the fact that the appellants do not dispute the withholding of monies from the union members' pay due

(Footnote continued from preceding page.)

intention on the part of the Legislature to treat matters differently, with regard to the quantum of proof necessary to establish a violation of the respective sections, depending upon the type of complaint lodged. Otherwise, there would have been no reason for the Act to elaborate upon the scope of the term "employer" in the criminal portion, given that it was already defined in another section, unless different proof levels were intended. Such a reading gives full effect to every portion of the Act, as we are required to do by law. See 1 Pa.C.S. §1921(a). Thus, we do not find *Guigliano* to be controlling so as to hold harmless either of the appellants by inquiring into how each *functioned* within the entity.

More importantly, we hold that the matter at bar is to be resolved under contract principles, which, as it is applicable to the case at bar, do not look to the breaching party's thought processes in assessing whether the terms of the agreement were met. The appellants' failure to comply with their part of the contract, due in no part to the conduct of the appellee, renders each liable. To hold otherwise would place a hardship upon a party who had no hand in impairing the implementation of the agreement. All matters being equal, we read the statute and the case law to place the onus on the appellants to satisfy their part of the contract.

As always, the parties can relieve themselves in future agreements for such losses by excepting themselves from accountability in the contract, or insuring themselves against such a situation.

We also posit the question of whether the appellants' lack of diligence in supervising their operations, as far as accounting matters are concerned, was a contributing factor in the defalcation of the monies, and, thus, would impede their attempt to allege a supervening act as a defense to their liability. See 6 Corbin on Contracts §1329 at 346-48 (1962).

the various funds. Nor do the appellants argue that the appellee has done some act or failed to do an act violative of the collective bargaining agreement and justifying a holding in abeyance of the renumerations owed under the explicit contractual terms.

As a result, as we read the Act in toto, a "good faith contest" should be premised upon some impropriety on the part of the employee/obligee affecting his right to his "wages", in this case pension and other welfare benefits, due him from the obligor. Under the particular circumstances here, we fail to see how the actions of a third party (embezzler) affects a *right* owed a signator to a bilateral agreement which has been faithfully adhered to by the obligee.

Judgment affirmed.

Opinion of the Court of Common Pleas
of Allegheny County, Pennsylvania
Entered May 2, 1986

CIVIL DIVISION

NO. GD84-3461

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, as agent for PETER J. LIVOLSI, and ALBERT W. BETLER, Trustees ad litem, LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA WELFARE AND PENSION FUNDS, THE CONSTRUCTION INDUSTRY ADVANCEMENT PROGRAM OF WESTERN PENNSYLVANIA FUND, and the LABORERS DISTRICT COUNCIL OF WESTERN PENNSYLVANIA and its affiliated local unions,

Plaintiffs,

vs.

AMIDIO MATTEI, JOSEPH MATTEI, and DOMENIC J. MATTEI,

Defendants.

OPINION

McGOWAN, J.

COUNSEL OF RECORD:

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OPINION

McGOWAN, J. MAY 2, 1986

This action is before the Court to determine the individual liability of corporate officers for violations of the Pennsylvania Wage Payment and Collection Law, Act of July 14, 1961, P.L. 637 §1 et seq. as amended, 43 P.S. §260.1 et seq.

Plaintiffs are agents of assorted labor union trust fund trustees, labor union trust funds and a labor union.

Defendants, Dominic and Amidio Mattei (hereinafter Officers) are shareholders of Mattei Brothers, Inc., (hereinafter Mattei) a construction contracting firm doing business in Western Pennsylvania and the surrounding areas. Dominic Mattei is the Secretary-Treasurer of Mattei and controls 49% of the stock and Amidio Mattei is President of Mattei and controls 50% of the stock.

On or about October 27, 1982, Mattei entered into a collective bargaining agreement with the Laborer's District Council of Western Pennsylvania, a labor union.

Pursuant to the agreement, Mattei was required to make certain monthly payments to the labor unions and trust funds for pension, welfare and dues for the benefit of employees covered under such agreements.

By stipulation of counsel, it was agreed that Mattei failed to pay $35,398.12 to Plaintiffs as required contributions to the assorted labor trust funds in accordance with the above-mentioned agreement. Said payments were due and payable between May 1, 1983 and November 15, 1983. Twenty-five percent (25%) of the principal amount due is $8,849,53.

Mattei filed a Chapter 11 bankruptcy petition in the Bankruptcy Court, Western District of Pennsylvania on October 24, 1983 at No. 83-2294. Mattei's filing in Bankruptcy Court is not a bar to the instant proceedings against the officers individually. *Commonwealth v. Bross*, 15 D & C 3d 229 (1980).

The Pennsylvania Wage Payment and Collection Law (hereinafter WPCL) is a legislative enactment designed to insure that all employers who agree to pay their employees all wages and benefits directly or partly through intermediary trust funds can be made to comply with those agreements as long as they are bound by such agreements. It is admitted that Mattei officers were clearly required to make payments under its agreement with Plaintiffs. It is admitted that they did not.

The power to enforce the requirements of the WPCL is given to the Secretary of Labor and Industry (§260.8) and "... any employe or group of employes, labor organization or party to whom any type of wages is payable" (§§260.9a and 260.11a).

43 P.S. §260.9a sets forth civil remedies and penalties available to persons who may proceed against employers who violate the WPCL provisions and allows any Plaintiff who receives a judgment in their favor to be awarded reasonable attorney's fees incurred in the case.

43 P.S. §260.11a sets forth criminal remedies and penalties that may be instituted by those persons previously described. Prior to the 1977 amendments of the WPCL, the section providing for criminal and civil penalties, Act of July 14, 1961, P.L. 637, §9, 43 P.S. §260.9, provided that "Any employer who *willfully* violates any provision of this Act shall be guilty of a summary offense" (emphasis provided). The 1977

amendments revised the WPCL by adding §11.1, 43 P.S. §260.11a which among other things eliminated the element of "willfulness" as a requirement for imposition of criminal sanctions.

Defendants, while admitting that they are clearly employers under the definitional section of the WPCL, 43 P.S. §260.2a, claim that they should not be held personally liable absent a showing of culpable behavior on their part. The Defendants have confused limiting language from prior enactments of the WPCL with the form of it in effect at the time of their acts. They have also avoided the distinction between the civil and criminal remedies available to Plaintiffs.

As was previously mentioned, the language requiring *willful* violation was removed from the statute, therefore, no mens rea, culpability or scienter need be proven in a criminal prosecution.

It could hardly thus be said that such was necessary to impose civil liability.

The only requirements for the establishing of civil liability of an employer for failure to comply with the WPCL are set forth in Section 3 of the Act, 43 P.S. §260.3. There is no requirement that an employee prove scienter or an employer's mens rea to prevail in his case. The Defendants claim that they acted without culpability is therefore of no consequence.

Defendants have admitted that they failed to make required payments to Plaintiffs and they have not presented any good faith contest or dispute or Plaintiffs wage claim as such a defense is allowed in §260.10.

Defendants claimed that due to the embezzlement of corporate funds by an employee, they were forced into a seriously undercapitalized financial position. They suggested that this unfortunate occurrence should be considered a mitigating factor when determining the question of their individual liability under the WPCL.

The good faith of the Defendants in asserting this proposed defense is not questioned. The impossibility of entertaining their proposition is established by a clearly stated passage in the WPCL, §10, 43 P.S. §260.10, which deals exclusively with liquidated damages available to Plaintiff employees and states in pertinent part that liquidated damages of twenty-five percent (25%) of the total wages due will be paid unless a "... good faith contest or dispute of any wage claim including the good faith assertion of a right to set off or counterclaim exists accounting for such non-payment ..." 43 P.S. §260.10.

The Defendants have neither contested nor disputed the amount of unpaid wages due to the Plaintiffs. They have in fact stipulated to the amounts unpaid. Therefore, their claimed good faith defense of insufficient assets resulting from embezzlement of corporate funds is ineffective as to liquidated damages. As there is no language in the civil remedies section of the WPCL, 43 P.S. §260.9a, relating to good faith contests or disputes of the amounts of unpaid wages due (unless the claim has been pursued by reference to the Secretary of Labor and Industry §260.9a(c)) the Defendants have no right under the WPCL to assert defenses to the unpaid wage claims at all. Again, even if the Defendant's contentions are considered a good faith defense, they do not contest or dispute the amount of the unpaid wages claimed by Plaintiffs. The Defendants therefore have not asserted an acceptable defense.

Plaintiffs having complied with the requirements of proving their case under the Pennsylvania Wage Payment and Collection Law, are entitled under the Act to recover all stipulated unpaid wages due from the Defendants individually as officers of the corporation, Mattei Brothers, Inc. Liquidated damages of twenty-five percent (25%) are also due to Plaintiffs from Defendant as individuals and officers of the corporation. Plaintiffs have waived their right to collect attorney's fees in this case by their own decision.

Unpaid wages of $35,398.12 and liquidated damages of $8,849.53, totaling $44,247.65 are due the Plaintiffs by the Defendants, Dominic Mattei and Amidio Mattei.

Petition for Rule to Show Cause Why Judgment Should Not Be Opened and/or Stricken as Being Void, Stay of Proceedings and Released from Levy

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO: G.D. 84-3461

PETITION FOR RULE TO SHOW CAUSE WHY JUDGMENT SHOULD NOT BE OPENED AND/OR STRICKEN AS BEING VOID, STAY OF EXECUTION PROCEEDINGS AND RELEASE FROM LEVY

LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, ET AL.,

Plaintiff,

vs.

DOMENIC J. MATTEI and AMIDIO MATTEI,

Defendants,

and

MARY LOUISE MATTEI,

Terra Tenant.

PETITION FOR RULE TO SHOW CAUSE WHY JUDGMENT SHOULD BE OPENED AND/OR STRICKEN AS BEING VOID, STAY OF EXECUTION PROCEEDINGS AND RELEASE FROM LEVY

And Now come the Petitioners, DOMENIC J. MATTEI and AMIDIO MATTEI, by their attorney, P. ANDREW DIAMOND, ESQUIRE, who respectfully represent:

1. Your Petitioners are adult individuals residing in Allegheny County, Commonwealth of Pennsylvania and two of the Defendants named in the proceedings numbered above.

2. The Respondents, the Plaintiffs captioned above, LABORERS COMBINED FUNDS OF WESTERN PENNSYLVANIA, ET AL. are a non-profit corporation and various Trustees of union fringe benefit organizations with offices situate at 1109 Fifth Avenue, Pittsburgh, Allegheny County, Commonwealth of Pennsylvania 15219.

3. On January 13, 1986 judgment was entered against the Petitioners designated herein in the amount of $44,241.65 at the proceedings numbered above on the non-jury verdict first entered by this Court on October 16, 1985.

4. That execution proceedings have been issued under the judgment and presently pending is the execution sale of certain real estate in which the Petitioners share an interest. The property is situate at 4854 Streets Run Road, Baldwin Borough, Allegheny County, Commonwealth of Pennsylvania and is scheduled for Sheriff's Sale on December 4, 1989.

5. The judgment entered in these proceedings should be opened and/or stricken as being void, the execution dissolved and property released from levy for the following reasons:

a) The judgment upon which the pending execution proceeding have been issued was predicated upon statutory authority and

jurisdiction conferred upon this Court by the Pennsylvania Wage Payment and Collection Law, 43 Pa. C.S.A. §260.1 etc.

b) That this Court from the first instance was without subject matter jurisdiction in these proceedings. The Courts of Common Pleas are pre-empted from exercising jurisdiction because of the applicable provisions of the Employee Retirement Income Security Act of 1974; Section 514(a); 29 U.S.C. §1144(a) *McMahon vs. McDowell*, 794 F2d. 100 (3rd. Cir. 1986); *Metropolitan Life Insurance Co. vs. Mass. 471* U.S. *724*, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985).

c) That the judgment entered in these proceedings was in violation of an Act of Congress and the Supremacy Clause of Article VI, Section 2 of the United States Constitution. Any action under taken to enforce the judgment constitutes a continuing violation against the Constitutional prohibition.

d) A challenge to the original jurisdiction of this Court has not heretofore been raised or adjudicated nor has it been waived.

WHEREFORE, Petitioners request this Honorable Court issue a Rule To Show Cause Why The Judgment entered in these proceedings Should Not Be Opened And/Or Stricken as Void And Release Property From Levy and pending disposition of same Stay of Execution Proceedings.

Respectfully submitted,

P. ANDREW DIAMOND
P. ANDREW DIAMOND
Attorney for Petitioners

VERIFICATION

I verify that the statements made in this Pleading are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.

DOMENIC J. MATTEI

Dated: November 16, 1989

ORDER OF COURT

AND NOW, to wit this 28 day of Nov., 1989, it is hereby ORDERED AND DECREED that the Petition for Rule to Show Cause Why Judgment Should Not be Opened and/or Stricken as Being Void, Stay Execution Proceedings and Release from Levy is denied.

By the Court:

STRASSBURGER, J.

Statute—29 U.S.C. §1144(a)

29 U.S.C. §1144(a)

This Act shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in §1003(2) of this title and not exempt under §1003(b) of this title.

Statute—43 Pa. C.S.A. §260.1 through §260.11a

§260.1 Short title

This act shall be known and may be cited as the "Wage Payment and Collection Law." 1961, July 14, P.L. 637, §1.

§260.2a. Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"**Authorized representative.**" An employe of the Department of Labor and Industry who is empowered to perform duties assigned in conformity with all existing laws, rules and regulations administered by the department.

"**Check.**" A draft drawn on a bank and payable on demand.

"**Department.**" The Department of Labor and Industry.

"**Employer.**" Includes every person, firm, partnership, association, corporation, receiver or other officer of a court of this Commonwealth and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth.

"**Fringe benefits or wage supplements.**" Includes all monetary employer payments to provide benefits under any employe benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq.[1]; as well as separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employes' pay by the employer; and any other amount to be paid pursuant to an agreement to the employe, a third party or fund for the benefit of employes.

"**Secretary.**" The Secretary of Labor and Industry.

"**Wages.**" Includes all earnings of an employe, regardless of whether determined on time, task, piece, commission or other method of calculation. The term "wages" also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employes' pay by the employer.

1961, July 14, P.L. 637, §2.1, added 1977, July 14, P.L. 82, No. 30, §2, imd. effective.

§260.3 Regular payday

(a) Wages other than fringe benefits and wage supplements. Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employes on regular paydays designated in advance by the employer. Overtime wages may be considered as wages earned and payable in the next succeeding pay period. All wages, other than fringe benefits and wage supplements, earned in any pay period shall be due and payable within the number of days after the expiration of said pay period as provided in a written contract of

[1] 29 U.S.C.A. §1002, subsec. (3).

employment or, if not so specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period. The wages shall be paid in lawful money of the United States or check, except that deductions provided by law, or as authorized by regulation of the Department of Labor and Industry for the convenience of the employe, may be made including deductions of contributions to employe benefit plans which are subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq.[1]

(b) Fringe benefits and wage supplements. Every employer who by agreement deducts union dues from employes' pay or agrees to pay or provide fringe benefits or wage supplements, must remit the deductions or pay or provide the fringe benefits or wage supplements, as required, within 10 days after such payments are required to be made to the union in case of dues or to a trust or pooled fund, or within 10 days after such payments are required to be made directly to the employe, or within 60 days of the date when proper claim was filed by the employe in situations where no required time for payment is specified.

As amended 1972, July 12, P.L. 855, No. 192, §1; 1977, July 14, P.L. 82, No. 30, §3, imd. effective.

§260.4. Notification

It shall be the duty of every employer to notify his employes at the time of hiring of the time and place of payment and the rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employe, a third party or a fund for the benefit of the employe and any change with respect to any of these items prior to the time of said change. Alternatively,

[1] 29 U.S.C.A. §1001 et seq.

however, every employer may give such notification by posting the aforementioned facts and keeping them posted conspicuously at the employer's place of business. Further, in cases where wages, amounts of any fringe benefits or wage supplements are set forth in a bona fide collective bargaining agreement and copies of that agreement are available to employes, then this shall satisfy the employer's duty to give notice.

As amended 1977, July 4, P.L. 82, No. 30, §4, imd. effective.

Historical and Statutory Notes

Section 10 of Act 1977, July 14, P.L. 82, No. 30, provides as follows:

"All acts or parts of acts are repealed insofar as they are inconsistent herewith except acts enacted in this session of the General Assembly which provide for different standards concerning the payment of wages."

§260.5 Employes who are separated from payroll before paydays

(a) Separated Employes. Whenever an employer separates an employe from the payroll, or whenever an employe quits or resigns his employment, the wages or compensation earned shall become due and payable not later than the next regular payday of his employer on which such wages would otherwise be due and payable. If requested, by the employe, such payment shall be made by certified mail.

As amended 1977, July 14, P.L. 82, No. 30, §4, imd. effective.

(b) Industrial Disputes. In the event of the suspension of work as the result of an industrial dispute, the wages and compensation earned and unpaid at the time of said suspension shall become due and payable no later than the next regular payday of his employer on which such wages would otherwise be due and payable: Provided, That if the employer is unable to prepare the payroll due to industrial disputes or for other reasons beyond the control of the employer, the employer shall not be deemed in violation of section 3 of this act.[1] 1961, July 14, P.L. 637, §5.

§260.6 Unconditional payment of wages conceded to be due

In case of a dispute over wages, the employer shall give written notice to the employe or his counsel of the amount of wages which he concedes to be due and shall pay such amount without condition within the time set by this act. Acceptance by the employe of any payment made hereunder shall not constitute a release as to the balance of his claim. 1961, July 14, P.L. 637, §6.

§260.7 Provisions of law may not be waived by agreement

Nothing contained in this act shall in any way limit or prohibit the payment of wages or compensation at more frequent intervals or in greater amounts or in full when or before due. No provision of this act shall in any way be contravened or set aside by a private agreement. 1961, July 14, P.L. 637, §7.

[1] Section 260.3 of this title.

§260.8 Enforcement

The Secretary of Labor and Industry shall have the duty, but not the exclusive right, to enforce and administer the provisions of this act, to investigate any alleged violations of this act and to institute prosecutions and actions as provided hereunder. Nothing in this act shall authorize the secretary to initiate a civil action for unpaid wages which are subject to disposition under grievance and arbitration procedures of a collective bargaining agreement. The Department of Labor and Industry shall have the power to make rules and regulations for the administration of this act.

Every employer shall keep open to inspection by the secretary or his authorized representative, all payroll records or other records or documents relative to the enforcement of this act. Such inspection may be made by the secretary or his authorized representative at any reasonable time. Every employer shall permit the secretary or any authorized representative to interrogate any employe in the place of employment and during work hours with respect to such records or documents. Where such records are maintained at a central record keeping office outside of the Commonwealth, such records shall be made available for inspection at the place of employment within seven calendar days following verbal or written notice from the secretary or his authorized representative. Where a microfilm or any other method is authorized for record keeping purposes, the employer shall make available to the secretary or his authorized representative, the equipment which is necesasry to facilitate review of the records.

As amended, 1977, July 14, P.L. 82, No. 30, §4, imd. effective.

§260.9a. Civil remedies and penalties

(a) Any employe or group of employes, labor organization or party to whom any type of wages is payable may institute actions provided under this act.

(b) Actions by an employe, labor organization, or party to whom any type of wages is payable to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction, by such labor organization, party to whom any type of wages is payable or any one or more employes for and in behalf of himself or themselves and other employes similarly situated, or such employe or employes may designate an agent or representative to maintain such action or on behalf of all employes similarly situated. Any such employe, labor organization, party, or his representative shall have the power to settle or adjust his claim for unpaid wages.

(c) The employe or group of employes, labor organization or party to whom any type of wages is payable may, in the alternative, inform the secretary of the wage claim against an employer or former employer, and the secretary shall, unless the claim appears to be frivolous, immediately notify the employer or former employer of such claim by certified mail. If the employer or former employer fails to pay the claim or make satisfactory explanation to the secretary of his failure to do so within ten days after receipt of such certified notification, thereafter, the employer or former employer shall be liable for a penalty of ten percent (10%) of that portion of the claim found to be justly due. A good faith dispute or contest as to the amount of wages due or the good faith assertion of a right of set-off or counter-claim shall be deemed a satisfactory explanation for

nonpayment of such amount in dispute or claimed as a set-off or counter-claim. The secretary shall have a cause of action against the employer or former employer for recovery of such penalty and the same may be included in any subsequent action by the secretary on said wage claim or may be exercised separately after adjustment of such wage claim without court action.

(d) In any civil action brought under the provisions of this act, the Secretary of Labor and Industry may require the employer to post bond or security to secure payment of the entire claim of the employe with credit in the amount of any good faith assertion of a right of set-off or counter-claim. Such bond or security shall be posted in the court where the civil action is brought. The request for bond or security shall be signed by the secretary and shall provide that such bond or security in the amount stated shall be posted within 30 days of service thereof on the employer. If such bond or security is not posted within the 30-day period, the employer will be deemed to have admitted his liability and execution may immediately ensue.

§260.10. Liquidated damages

Where wages remain unpaid for thirty days beyond the regularly scheduled payday, or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employe of a proper claim or for sixty days beyond the date of the agreement, award or other act making wages payable, or where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists

accounting for such non-payment, the employe shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater.

As amended 1968, July 31, P.L. 1017, No. 297, §1; 1972, July 12, P.L. 855, No. 192, §3; 1977, July 14, P.L. 82, No. 30, §7, imd. effective.

§260.11a. Criminal penalties

(a) The secretary or any employe, group of employes, labor organization or party to whom any type of wages is payable may institute prosecutions under this act.

(b) In addition to any other penalty or punishment otherwise prescribed by law, any employer who violates any provisions of this act shall be guilty of a summary offense and, upon conviction thereof, shall be punished by a fine of not more than three hundred dollars ($300), or by imprisonment up to 90 days, or by both, for each offense. The good faith contest or dispute by any employer of any wage claim or the good faith assertion of a right of set-off or counter-claim shall not be considered a violation of this act: Provided, That the employer has paid all wages due in excess of the amount in dispute or asserted to be subject to a right of set-off or counter-claim. Nonpayment of wages to, on account of, or for the benefit of each individual employe shall constitute a separate offense.

(c) Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of such summary offense.

(d) All fines or penalties collected under this act shall be paid into the State Treasury through the Department of Revenue to the credit of the General Fund.

1961, July 14, P.L. 637, §11.1, added 1977, July 14, P.L. 82, No. 30, §9, imd. effective.

Constitution of the United States—Article VI, Section 2

Article VI, Section 2; Constitution of the United States

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.